No. 85-546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,

Petitioner,

vs.

FLORENCE BLACKETTER MOTTAZ, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

RESPONDENTS' BRIEF

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EDITOR'S NOTE

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QUESTION PRESENTED

DOES THE GENERAL STATUTE OF LIMITATIONS, 28 U.S.C. 2401(a), BAR AN ACTION UNDER 25 U.S.C. 345 INVOLVING SPECIFIC LAND ALLOTMENTS WHERE THE CLASS CONSISTS OF INDIANS WHOSE LAND ALLOTMENTS WERE HELD IN TRUST FOR THEM BY THE UNITED STATES AND WERE SOLD WITHOUT THE CONSENT OF ALL THE OWNERS AND WITHOUT A COURT HEARING OR PROCEEDING?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes, Regulations and Rules:

Cases:

Treatises and Secondary Authorities:

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STATEMENT

The respondent is a Chippewa Indian who filed this action on December 30, 1981, seeking damages from the petitioner, United States of America, who held Indian land in trust for original allottees, their descendants, heirs and assigns, and transferred said trust allotments without consent or permission of said allottees, their descendants, heirs and assigns, including land owned by the plaintiff. The action is brought as a yet uncertified class action pursuant to Rule 23 of Federal Rules of Civil Pro-

cedure on behalf of herself and all others similarly situated. There are three apparent classes at this time: (1) all of those descendants, heirs and assigns of the original allottees relating to land that is located in the Leech Lake area of Cass County, Minnesota; (2) all of those descendants, heirs and assigns of the original allottees relating to the land that is located in the State of Minnesota; (3) all of those descendants, heirs and assigns of the original allottees relating to the land that is in the United States of America.

As the records indicate, in the Leech Lake area alone, there were 6,111 heirs in the 1950's. Consents obtained were from only 2,914 heirs. It is estimated that there are over 10,000 innocent victims located in the Leech Lake area alone. In addition, the Department of the Interior has indicated that there is a problem of significant magnitude in the Northern Great Plains area as well and perhaps in other areas of the United States (J.A. p. 40). The exact number of victims in each area remains undisclosed at this time.

Correspondence from the Department of the Interior itself indicates that the transactions represented in this class were "void", were a "direct result of an unauthorized administrative action" and of "BIA misfeasance". "The problem is that between 1948 and 1958 BIA officials approved numerous conveyances of inherited allotments without the requisite consents of all of the Indian landowners. This was done notwithstanding a June 24, 1955 Memorandum from the Associate Solicitor for Indian Affairs to the Commissioner of Indian Affairs advising that the interest of a non-consenting owner may not be sold by the Secretary. As a result, it appears that numerous transactions were entered

into without the requisite authority and are, therefore, void." (J.A. pp. 18 & 19)

It should be noted that this uncertified class action is not one for actual return of the property. There are, therefore, no innocent third parties nor bona fide purchasers for value that will be damaged if the relief prayed for is granted. It would seem that the defendant has an obligation not only to the plaintiffs in this class action who have had their property taken without their consent and without due process of law but also to protect the innocent third parties and bona fide purchasers for value by making restitution to the class of respondent in this action and thereby bar a future action in which innocent third parties and bona fide purchasers for value may suffer severe damage.

Petitioner continues to paddle semantics in its discussion and characterizes respondent as having dropped her claim for title. At no time in this proceeding did respondent drop her claim for title. To the contrary, the claim for title is the essence and bottom line of respondent's case. Her position is simply that the land remains in the name of Mottaz and the other heirs of the property despite what some pieces of paper executed by petitioner without her consent and without a court hearing purport to do. Part of the confusion arises over the failure to distinguish between a liability theory and a theory relating to an election of remedies for damages between the land itself and money. Theoretically, the land has remained in the name of Mottaz and the other heirs. The decision of the Eighth Circuit confirms this position. However, as a practical matter, some pieces of paper were issued by the petitioner and the problem remains as to how to treat those pieces of paper, which have now been filed of record with the County Recorder in Cass

County, Minnesota. This is what the word "rescission" more properly refers to. When we talk about rescission, we talk about a court order that will change the effect of those pieces of paper. The decision of the Eighth Circuit reflects the fact that a void transfer cannot effectively change title. If someone purported to transfer title to my house by executing an agreement that said that it was transferred from me to a grantee and if this was done without my consent or without some judicial determination allowing the transfer, it would be void and those pieces of paper would not theoretically change my ownership. However, it would create a pragmatic problem if the papers were filed with the County Recorder's office. The Eighth Circuit recognized the problem that respondent faces if the land is simply declared to be still in her name. In order to grant meaningful relief, then, in addition to the "liability issue", the "damages" issue also needs resolution. In order to accomplish this, the respondent and other heirs to the Mottaz property and the members of this uncertified class, or those that choose to do so, have then made an election of remedies on their damages, to-wit, to accept money damages representing the value of the land. This is probably the only workable solution for a class action, and as the Eighth Circuit recognized the only workable solution in the Mottaz situation because of the fact that there is no access to the parcel of land. This was all due to the actions of the United States that held the land in trust for the heirs and descendants of the original allottees. Without the additional remedy of being able to elect damages as an alternative, there would be no practical meaningful remedy for either Mottaz and the heirs on these parcels or other members of the class. Practical considerations, however, dictate that the

class made an election of remedies to accept money as the measure of damages.

According to the Bureau of Indian Affairs (BIA) records, three (3) Chippewa Indian ancestors of the respondent received trust allotments on the Leech Lake Reservation, located in the County of Cass, State of Minnesota, on December 5, 1905. The trust allotments were made pursuant to the *General Allotment Act of February 8, 1887*, 24 Stat. 388, 25 U.S.C. 331 et seq., and the *Nelson Act of January 14, 1889*, 25 Stat. 642. Title to these allotments were held in trust by the United States for a period of twenty-five (25) years and then extended indefinitely when the reservation voted to accept the provisions of the *Indian Reorganization Act of June 18, 1934*, 48 Stat. 985, 25 U.S.C. 461 et seq., specifically, Section 2, 25 U.S.C. 462. These trust allotments are identified as Leech Lake 855, 856, and 857, and were each 80 acres in size.

Respondent inherited a share of these allotments from her mother, Esther Taylor, aka Esther Grasshopper, LL-857, her mother's sister, Mary Knickerbocker, LL-855, and the latter's son, David Knickerbocker, LL-856. In 1954, during the extended trust period, these lands were transferred by the Department of the Interior to the United States Forest Service and now form part of the Chippewa National Forest. Respondent *never* made an application for the sale of these allotments, and she *never* signed a consent form approving the sale. Respondent *never* received payment and no proof of payment has ever been produced by petitioner. (Pl. Depos. p. 46).

In its Statement, petitioner asserts that some of the heirs who own fractional interests of the three (3) Mottza allotments petitioned the Department of the Interior to sell the

allotments. There was absolutely no showing at any of the stages in this proceeding that any of the heirs to the Mottaz allotments petitioned for sale. On the contrary, the form referred to at the bottom of page 2 was a mimeographed form that was apparently mailed out to all of the heirs of any of the parcels of land that petitioner had decided it wanted. The form itself was very misleading and, in fact, untrue. It suggested to the Indian recipient that other people involved in their particular allotment parcels had petitioned for sale. What the mimeographed form in fact stated, if it is to have any truth at all, is that some people involved in some of the parcels in Cass County may have requested the sale of their land. This was not, however, the three (3) Mottaz allotments. As the Statement correctly indicates in the case of these three (3) allotments, the United States as trustee sold the three (3) parcels to itself. The Eighth Circuit Court of Appeals specifically held in Mottaz that the failure of Mottaz to return the "Consent to Sale" form does not constitute consent.

Petitioner has argued that the "sales" were authorized under 25 U.S.C. 483, which "reinstated" the *Act of June 25, 1910*, 36 Stat. 855, 25 U.S.C. 372. The *Act of 1948* may have, in effect, repealed restrictions imposed under *The Indian Reorganization Act of 1934*, but we do not agree that the *Act of 1910* was fully reinstated. The language of the *Act of 1948*, 25 U.S.C. 483, clearly placed additional conditions on the sale of trust allotments, beyond the requirements of 25 U.S.C. 372. The *Act of 1948* specifically states that the Secretary of Interior is authorized to sell the property "upon application of the Indian owners". The petitioner in its Motion for Summary Judgment in the trial court stated that after 1958 all such sales were

made only of the fractional interest of *consenting* heirs. This modified procedure was followed even though no new statutes were passed since 25 U.S.C. 483 was enacted in 1948.

During the summer of 1981, respondent contacted an attorney for the first time to examine another allotment not in dispute in this case. After reviewing her papers, her attorney contacted the Bureau of Indian Affairs concerning the lands in dispute in this case, LL-855, LL-856, and LL-857. On or about November 25, 1981, an agent of the Bureau of Indian Affairs, in a telephone conversation with respondent's attorney, stated that respondent had a claim under the "2415 Land Claims Project", where allotments were sold and not all of the heirs conveyed their interest in the allotment (J.A. pp. 44 & 46). Upon notification that she had a cause of action, the respondent filed this lawsuit, which was commenced on December 30, 1981.

In short, this action was brought by an Indian respondent concerning her loss of interest and rights in allotment lands, which were sold by the petitioner without her application and consent, thereby depriving her of possession, use, enjoyment, and any income and improvements thereof.

Congress has clearly expressed a concern to protect such interest by enacting specific Indian laws that cannot be overridden by general laws that were *never* intended to apply to these special grants or rights. Furthermore, the petitioner, to its benefits, breached its fiduciary responsibility to the respondent by selling her allotment land without her consent to itself.

HISTORICAL BACKGROUND

Trust allotments were originally granted when Congress passed the *General Allotment Act of February 8, 1887*, 24

Stat. 388, 25 U.S.C. 331 et seq., and the *Nelson Act of January 14, 1889*, 25 Stat. 642, whereby the United States Government provided up to 80 acres of land to individual Indians. The "trust" status of the land restricted its sale and imposed upon the government a responsibility to protect the land for the allottees. The Act was based on the theory that an Indian person who owned land would assimilate more easily into the white culture and become self-sufficient through farming. *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245 (1973). Noted Indian authority, Felix S. Cohen, in his *Handbook of Federal Indian Law* (1982 Ed.), pp. 131 and 132, states that the assimilationists and humanitarians were convinced that the "termination of tribal life was necessary if the Indian was to participate fully in the American system". Ironically, another aim of the allotment system was the protection afforded by a government patent versus tribal law or custom. See Cohen, supra, page 132.

Between 1887 and 1934, numerous pieces of legislation were passed that provided for removal of many of the restrictions on the sale, lease or grants of rights-of-way, to trust allotments. See 25 U.S.C. 319, 320, 336, 349, 357, 372, 379, 393, 395, 399, 402, 403, 404, and 405. The net result of these enactments was a steady erosion of Indian ownership in which trust allotments were passed from native ownership to non-Indian owners. Approximately 90 million acres out of a total of 138 million acres were sold during this time. See Cohen, supra, page 138. One historian, William Folwell, in the *History of Minnesota*, described this period as one of greed for land and resources caused by laws and acts that had "the appearance of a systematic premeditated scheme". A Department of Interior

report entitled the Meriam Report, Institute for Government Research, *The Problem with Indian Administration* (Baltimore: The John Hopkins Press, 1928), found that the Allotment Act had destroyed the Indian land base.

In an effort to stop such practices, the *Indian Reorganization Act of 1934*, 48 Stat. 985, 25 U.S.C. 461 et seq., was passed, and once again Indian trust allotments were restricted, 25 U.S.C. 462, unless they were sold to the Indian tribes, 25 U.S.C. 464.

The pressure to remove restriction on Indian allotments arose again, resulting in the passage of an *Act on May 14, 1948*, 62 Stat. 236, 25 U.S.C. 483, which allowed the sale of allotment land once again, but only "upon the application of the Indian owners".

ARGUMENT

JURISDICTION:

The district court below had jurisdiction to hear this claim pursuant to 25 U.S.C. 345, and 28 U.S.C. 1346 (a)(2) and (b).

The issues of jurisdiction and the government's trust responsibility involved in this case have been in effect decided by the two cases of *United States v. Mitchell*, 100 S.Ct. 1349 (1980) and *United States v. Mitchell*, 102 S.Ct. 2961 (1983), referred to respectively hereafter as *Mitchell I* and *Mitchell II*.

These historic decisions clarified the jurisdictional issue for actions brought against the United States, and provided a test for determining if money damages are available in such a suit. The test includes:

1) Statute providing consent to suit by the United States;

2) Substantive right to money damages must be found in some statute or regulation; and

3) Source of substantive law relied upon "can fairly be interpreted as mandating compensation" for the damages sustained. *Mitchell II*, supra, page 2967, 2968.

This case has been brought by an Indian Plaintiff, on behalf of herself and all others similarly situated, against the United States, concerning their loss of interest and rights in allotment lands.

These requirements are clearly met under 25 U.S.C. 345, which provides jurisdiction to hear claims concerning allotments brought by Indians. There is no statute of limitations and no limitations in the amount in controversy. Since 1901, the United States is required to be a party defendant in any such action and this is the only amendment to that statute. The petitioner has consented to suit under 25 U.S.C. 345. There is no dispute within the Circuit Courts of Appeal that 25 U.S.C. 345 provides jurisdiction and contains the necessary consent to bring suit against the United States. *Arenas v. United States*, 322 U.S. 419, 64 S.Ct. 1090 (1944); *Antoine v. United States*, 637 F.2d 1177, 1181 (8th Cir. 1981); *Scholder v. United States*, 428 F.2d 1123, 1125-26 (9th Cir. 1970).

The requirements are also met under 28 U.S.C. 1346 since this court has determined in *Mitchell II*, supra, page 2967, that if a claim falls within the terms of the "Tucker Act", the United States has consented to suit. Although the *Mitchell II* case was based on a Court of Claims action where the "Tucker Act" is now found at 28 U.S.C. 1491, it follows that its counterpart in the district courts, which

is now found at 28 U.S.C. 1346, would also provide jurisdiction and consent to suit.

There are other substantive laws that demonstrate a right to money damages. It is important to note that the Supreme Court in *Mitchell II* did not require that the substantive laws which a plaintiff relies on to specifically state that money damages are available but merely to "fairly be interpreted as mandating compensation", *Mitchell II*, supra, page 2968, nor do the substantive statutes have to provide a second waiver of sovereign immunity. *Mitchell II*, supra, page 2969.

Besides providing jurisdiction and the necessary consent to bring suit against the United States, 25 U.S.C. 345 can also be fairly interpreted as mandating compensation. The Act provides for actions to be brought by those "who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled". Earlier cases naturally focused on disputes concerning issuance of the allotment in the first instance since the allotment program was in the early stages of implementation. The Circuit Courts, as indicated in the following cases, are unanimous that once the allotment has been issued the language of the Act clearly permits the courts to determine not only whether or not an allottee has been deprived of an allotment but also whether or not there has been a deprivation of rights connected thereto. The monetary damage issue under a 25 U.S.C. 345 action was decided in the Indian plaintiff's favor by the Eighth Circuit Court of Appeals in *Antoine v. United States*, 637 F.2d 1177 (1981), wherein it was stated, "Moreover, the language of 25 U.S.C. 346 compels the conclusion that Congress intended to permit damage suit against the

United States under section 345". *Antoine*, supra, page 1182. A boundary dispute was involved in another Eighth Circuit case in *Fontenelle v. Omaha Tribe of Indians*, 298 F.Supp. 855 (1969). The Ninth Circuit has allowed money damages and stated that the purpose of 25 U.S.C. 345 is to "protect or preserve an allotment once issued". *Scholder v. United States*, 428 F.2d 1123, 1126 (1970), cert. denied, 400 U.S. 942 (1970). That case involved irrigation construction charges that became liens on allotment land. Also, in the same circuit, money damages were allowed for loss of rental income collected by the United States acting in their trust capacity, *United States v. Pierce*, 235 F.2d 885 (1956). See, also, in the same circuit, *Christensen v. United States*, 755 F.2d 705 (1981); *Big Spring v. United States*, 767 F.2d 614 (1985); *Sampson v. United States*, 533 F.2d 499 (1976); and *Gerard v. United States*, 167 F.2d 951 (1948).

The government's position that 25 U.S.C. 345 actions should be restricted to the issuance of allotments in the first instance is not supported by the cases that petitioner cites. In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456 (1972), there was a finding against the Indian allottee but not because the suit involved a mineral interest dispute. The court held that the mineral interest in dispute was not appurtenant to an allotment. "Although the interest in the mineral estate.....perhaps could be made the subject of an allotment, it has never been so subjected. Nor is it appurtenant to an allotment. It remains tribal property." *Affiliated Ute Citizens*, supra, page 1467. In *First Moon v. White Tail*, 270 U.S. 243 (1926), the allottee had a valid allotment in the first place so it was not necessary for the court to question the original

allotment in a claim by another heir. Furthermore, this case dealt with property occasioned by an Indian's death and such a transfer would remove the dispute from 25 U.S.C. 345 to be handled under probate law. *United States v. Preston*, 352 F.2d 352 (1965), concerned a case brought by a non-Indian attorney for fees incurred for work done on an allotment for an Indian. The court in *Vincenti v. United States*, 470 F.2d 834 (1972) dismissed the action against the United States, but that court reasoned that the United States was an innocent party in the dispute since the government did not receive any of the lost income alleged by the allottee. The lost income had gone to a third party while they held the land.

In *Mitchell I* the United States Supreme Court held that the *General Allotment Act* provided a limited trust relationship as to the government's responsibility to manage timber on Indian allotment lands. *Mitchell I* was remanded on other grounds and the Claims Court, 664 F.2d 265 (1981), held that the United States was subject to suit under various other statutes and regulations. The defendant's Petition for Certiorari, 457 U.S. 1104 (1982), was granted and on June 27, 1983, the United States Supreme Court in *Mitchell II* held:

> "that if the "claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Mitchell II*, supra, page 2967.
>
> "It nonetheless remains true that the Tucker Act "does not create any substantive right enforceable against the United States for money damages. . . A substantive right must be found in some other source of law, such as "the Constitution or any Act of Congress, or any regulation of an executive department."

> . . . The claim must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies upon "can fairly be interpreted as mandating compensation. . ." *Mitchell II*, supra, page 2969.
>
> "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity." *Mitchell II*, supra p. 2969.

The Supreme Court in *Mitchell II* reaffirmed the existence of the trust relationship between the government and Indians, or Indian Tribes, that "includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." *Mitchell II*, supra, page 2973. The Supreme Court held that the rules and elements of a common-law trust apply:

> "All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands and funds). Because the statutes and regulations at issue clearly establish a fiduciary obligation of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Government for damages sustained." *Mitchell II*, supra, page 2973.

The Court went on to discuss the necessary and inevitable consequences of a trust relationship and stated that if there is no liability for damages for breach of that trust, the trust itself is meaningless.

> "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. See Restatement (Second) of the Law of Trusts, Sections 205-212 (1959); G. Bogert, The Law of Trusts & Trustees, section 862 (2d ed. 1965); 3 A. Scott, The Law of Trusts, section 205 (3d ed. 1967). This Court and several other federal courts have consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from breach of the trust." *Mitchell II*, supra, page 2973.

Mitchell II has in effect decided Mottaz. The *Mitchell II* case concerned a breach of trust for mismanagement of timber lands while this case involves a breach of trust for the alienation or sale of Indian trust property which resulted in a direct benefit to the trustee. While the Court in *Mitchell II* said that the *General Allotment Act* itself did not impose any management duties on the United States, the Act does prohibit the sale or alienation of the allotted lands:

> "The trust language of the Act does not impose any fiduciary management duties or render the United States answerable for breach thereof, but only prevents improvident alienation of the allotted lands and assures their immunity from state taxation." *Mitchell II*, supra, page 2968.

If discretionary mismanagement is compensable, it follows *a fortiori* that outright sales without consents should

be compensable. Complete elimination of the trust property is a greater wrong than diminishing the value of the trust property.

In this case, the initial relationship of the United States as trustee, the Indian allottees as beneficiary, and the lands as the trust corpus is established by the *General Allotment Act of 1887* itself, and should provide an enforceable right to money damages. Furthermore, the independent provisions of 25 U.S.C. 348, 349, 354, 372, and 483, specifically establish a trust relationship and an enforceable right to money damages.

STATUTE OF LIMITATIONS

The Eighth Circuit Court of Appeals has properly held that 28 U.S.C. 2401(a) does not apply to a void transfer of Indian trust lands under the principles enunciated in *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922).

That court recognized the special trust relationship between the United States and Indian allottees by holding that the respondent's claim was not barred by the six (6) year statute (28 U.S.C. 2401(a)) "because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along." *Mottaz, et al. v. United States of America*, 753 F. 2d 71, 74 (1985).

While *Ewert* did not involve a federal statute of limitations in a suit against the United States, it did involve a government agent, working on allotment transactions, who violated a statutory provision that no government employer should have any interest or concern with the Indian and

his or her allotment. This court in *United States v. Hutto*, 256 U.S. 524, 41 S.Ct. 541 (1921), noted that the purpose of the *Ewert* statute was "to protect the inexperienced, dependent, and improvident Indians from the avarice and cunning unscrupulous men in official position, and . . . to prevent officials . . . to speculate on what inexperience or upon the necessities and weaknesses of these wards of the nation."

In *Ewert* a public official was not allowed to hide behind the shield of a statute of limitations. There was also no expressed trust relationship with the Indian in that case. In Mottaz, there is a breach of an expressed trust created under the *General Allotment Act of 1887* with the United States as trustee, the Indian allottees as beneficiaries, and the land as the trust corpus. In Mottaz, the trustee not only sold the trust property without the application or consent of the Indian owners but also benefited from the sale because it sold to itself. It should not be allowed to hide behind the statute of limitations in this case.

The General Allotment Act of 1887 contains a clear expressed trust within Section 5 of the Act, providing that title to allotments are to be held in trust by the United States. This distinguishes the Mottaz case from the holding against the Indians in *Menominee Tribe v. United States*, 726 F.2d 718, cert. denied, 105 S.Ct. 106 (1984), in which the court noted that there was no express trust in that case. See also *Mitchell II*, supra, page 2973, reaffirming the existence of the trust relationship between the government and the Indians where statutes clearly establish a fiduciary obligation.

In *Ewert*, the court quoted the following general rule from *Waskey v. Hammer*, 223 U.S. 85, 94 (1912):

> "The general rule is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer;"

Courts have looked with disfavor on situations where the trustee has been the beneficiary of the transaction noting the inherent conflict of interest. *Navaho Tribe of Indians v. United States*, 364 F.2d 320 (1966); and *Coast Indian Community v. United States*, 550 F.2d 639 (1977). See also, 3A Scott, *The Law of Trust*, section 170.1, which suggests that such a sale might be void.

Further support for the Eighth Circuit holding can be found in *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F.Supp. 1233, 1249 (1973), a case of mismanagement of Indian trust funds by the United States. There the court struck down a defense of the statute of limitations because a statute does not run against a beneficiary in favor of the trustee until the trust is repudiated and terminated. There are also a line of tax cases holding that a federal tax statute of limitations does not apply to income from Indian trust property. *Clark v. United States*, 587 F.2d 465 (1978); *Dodge v. United States*, 362 F.2d 810 (1966); *Daney v. United States*, 247 F.Supp. 533 (1965), affirmed 370 F.2d 791 (1966); and *Nash v. Wiseman*, 227 F.Supp. 552 (1963).

Begay v. Albers, 721 F.2d 1274 (1983), involved forgeries on Indian deeds where there was no consent from the Indians. The court held:

> "The forgeries rendered the deeds null and void. Without the consent of Begay and Mrs. Cecil Navaio to the conveyances, there was no termination of the trust relationship between the United States and these Indian wards" *Begay*, supra at 1281.

The argument in the Begay case was that the approval of the forged deeds by the Secretary of the Interior terminated the trust status. The 10th Circuit Court of Appeals specifically rejected that argument and held that the void deeds did not transfer anything and that the property still remained in the name of the Indian allottees. It is of interest to note that the Begay case also involved third parties who had held that land since 1946. In spite of that period of time, there was no statute of limitations discussion in the case. The court further held that 25 U.S.C. § 345 is not limited to the issuance of an allotment only.

"Thus, 25 U.S.C. § 345 is not limited, as appellants urge, to actions filed to compel the issuance of an allotment. The statute does, in the language of *Scholder v. United States*, 428 F.2d 1123, 1129 (9th Cir. 1970), serve "[a]lso to protect 'the interests and rights of the Indian and his allotment or patent after he has acquired it.' *Accord: Loring v. United States*, 610 F.2d 649 (9th Cir. 1979); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970); *United States v. Pierce*, 235 F.2d 885 (9th Cir. 1956); *Gerard v. United States*, 167 F.2d 951 (9th Cir. 1948)."

The United States miscites *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456 (1972), as authority for overruling the 8th, 9th and 10th Circuits which have allowed allotment actions under 25 U.S.C. § 345. All that Affiliated Ute held was that mineral interests were not part of the allotment and that therefore 25 U.S.C. § 345 would not apply to the mineral interests. In that case, Congress had passed a law giving the mineral rights to the *tribe*. If that had not been done, then the mineral rights would have been appurtenant to the allotment and it would have been a different result.

Petitioner has erroneously expressed concern that the Eighth Circuit's holding in Mottaz is in direct conflict with the Court of Claims position on Indian claims and the application of the statute of limitations. None of the cases cited by the United States have rejected the proposition that the existence of a fiduciary or trust relationship between the United States and the Indians would render the statute of limitations inapplicable. In *Menominee Tribe v. United States*, 726 F.2d 718, 722 (1984), cert. denied 105 S.Ct. 106 (1984), the court noted that there was no expressed trust involved in the case. It indicated that the ruling might be different if an expressed trust was present. In Mottaz, of course, there is obviously an expressed trust.

Petitioner cited *Hydaburg Cooperative Association v. United States*, 667 F.2d 64 (1981). However, in that case, the allotment lands were not at issue, and there was no fiduciary obligation over the funds once issued. *Capoeman v. United States*, 440 F.2d 1002 (1971) involved a dispute over administrative charges which were allowed by statute at the time the charges were made. In other words, plaintiff had no right to the money in the first place. In *Andrade v. United States*, 485 F.2d 660 (1973), cert. denied, 419 U.S. 831 (1974), the Indian plaintiff attempted to overturn a prior judgment that had been entered where he had notice and legal representation in the original proceeding.

Furthermore, the Court of Claims does not have jurisdiction over 25 U.S.C. 345 claims. Original jurisdiction is in the District Court, and there are no jurisdictional limitations. Clearly, the Eighth Circuit's holding in Mottaz is not in conflict with the Court of Claims.

The petitioner discusses *Christensen v. United States*, 755 F.2d 705 (1985), a Ninth Circuit decision. We see no conflict with Mottaz. That court applied a statute of limitations to a dispute over access to an allotment. *Loring v. United States*, 610 F.2d 649 (9th Cir. 1979) was a right-of-way case. Mottaz involves a void *sale* of trust lands. The *Christensen* court apparently felt compelled to follow another Ninth Circuit decision, *Loring*, supra. This was a confusing case where the plaintiffs never alleged federal jurisdiction under 25 U.S.C. 345. It may well be that if the *Loring* case had been argued from the start as a 25 U.S.C. 345 case rather than as an ordinary civil action, the court would have reached a different result. In *Vincenti v. United States*, 470 F.2d 845 (10th Cir. 1972), the statute of limitations was raised as a defense but the court held against the Indian plaintiff on other grounds. *Big Spring v. United States*, 767 F.2d 614 (1985), was a case involving the reservation of mineral rights to the tribe rather than being included in the allotment to individual Indians. In that case, the Ninth Circuit Court of Appeals in Footnote No. 1 specifically stated that *Big Spring* was not in conflict with the Eighth Circuit's holding in *Mottaz* because of the completely different facts involved in the two cases.

Petitioner also raises the Quiet Title Act of 1972, 28 U.S.C. 2409 a(f). This does not seem to make any serious difference concerning the statute of limitations issue. The Eighth Circuit Court of Appeals held that the six (6) year statute "does not bar claims of title to allotments because *Ewert* is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along". This analysis would, of course, apply to a 12 year statute of limitations as well as a six (6) year statute of limitations. Also, the Quiet Title

Act only applied to those that are relying on the waiver of sovereign immunity contained in that Act. In this case, Mottaz is relying on 25 U.S.C. 345. In addition, 2409 a(a) specifically states that: "This section does *not* apply to trust or restricted Indian Lands. . ." (Emphasis added). Inasmuch as this is obviously trust land, it seems clear that the Quiet Title Act would not apply. *Spaeth v. United States Secretary of the Interior, et al.*, 757 F.2d 937 (8th Circuit. 1985) establishes that if there is "a substantial possibility that the lands in question are trust or restricted Indian lands" then the exception for Indian trust lands contained in the Quiet Title Act make it inapplicable. This is also the reason that *Block v. North Dakota*, 461 U.S. 273 (1983), does not apply. That case involved a claim to a river bed by the State of North Dakota against the United States. Mottaz involves a specific allotment that was granted by the United States, held in trust by them as a trustee, and then transferred to itself without the consent of the heirs and without a court hearing and determination.

The American Land Title Association (ALTA) in its amicus brief deals with bona fide purchasers of real estate. In other words, those cases deal with innocent purchasers of Indian land and the rights of those innocent third party purchasers against an Indian who is now asserting title to the land. This is one of the primary reasons why, in this yet uncertified class action, we dismissed without prejudice our claim for actual return of the land. To proceed otherwise would involve many innocent third parties and would make the case difficult, if not impossible, to handle as a class action. In the present posture we feel the United States has an opportunity and, in fact, a duty

to both compensate the people whose land it sold without their consent and without a court hearing, and to protect innocent bona fide purchasers that may have possession of the land under some claim of title. The ALTA brief cites *Joines v. Patterson*, 274 U.S. 544 (1927), in support of its argument. However, in that case there were court proceedings involving the land. The parties went into court and had a guardian appointed. They later petitioned the court for sale of the land and the court authorized the sale. In other words, an important element of our jurisprudence was present in the *Joines* case but is not present in the *Mottaz* case, namely, a court hearing and determination.

Additional support for not applying the statute of limitations include the following:

STATUTE OF LIMITATIONS, 28 U.S.C. 2401 (a), DOES NOT APPLY TO INDIAN LAND ALLOTMENTS STATUTE 25 U.S.C. 345

A. THE ORIGIN AND HISTORY OF 28 U.S.C. 2401 (a), CLEARLY SHOW THAT IT WAS NOT INTENDED TO APPLY TO 25 U.S.C. 345 ACTIONS.

A review of the origins of 28 U.S.C. 2401(a) *conclusively* shows that this statute was never intended to apply to 25 U.S.C. 345 actions. 28 U.S.C. 2401(a), a general statute of limitations, was enacted in 1948, c. 646. 62 stat. 971, and was originally part of 41(20) of Title 28 of the 1940 Code. The relevant language of 41(20) in the 1940 Code was the same in the 1926 Code and in the 1911 codification of the Judicial Code where it originated, c. 231, section 24, 36 Stat. 1093. 41(20) of Title 28 was *not a*

general statute of limitations, but rather a *jurisdictional* statute that contained a *statute of limitations*, which stated that it was applicable to the actions enumerated within 41(20). There can be no question that when 41 (20) was enacted it did *not* pertain to actions brought under 25 U.S.C. 345, because that type of claim was and still is authorized under an entirely different provision of the law.

During the recodification of the Judicial Code in 1948, 41(20) of Title 28, the subject matter jurisdiction and the statute of limitations pertaining to those enumerated claims were divided, with subject matter jurisdiction now codified at 28 U.S.C. 1346, and the statute of limitations now codified at 28 U.S.C. 2401.

There is no evidence that Congress intended any changes in the substantive provision of the law as it existed prior to 1948. Therefore, 28 U.S.C. 2401 cannot be interpreted as an expansion of the six year statute of limitations to include Indian allotment actions brought under 25 U.S.C. 345.

No legislative history discloses any such intention in 1948, and none could be found in the amendments to 28 U.S.C. 2401 in 1949, 1959, 1966, and 1978. Furthermore, the Chief Revisor of the Judicial Code, Title 28, stated in an article written shortly after the 1948 revisions, Barron, *The Judicial Code*, 8 F.R.D. 439, 445-46 (1949):

> "Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments *no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.*

> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Revisor's Notes to each section in which are noted all instances where change is intended and the reason therefor." (Emphasis supplied).

A review of the Revisor's Notes finds no such express intent to place a limitation on Indian allotment actions under 28 U.S.C. 2401(a).

Furthermore, the general rule of law of statutory revisions is that "unless such intention is clearly expressed" no changes of law or policy can be presumed. *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199, 32 S.Ct. 626 (1912); *United States v. Ryder*, 110 U.S. 729, 4 S.Ct. 196 (1884); and *McDonald v. Hovey*, 110 U.S. 619, 4 S.Ct. 142, 146 (1884). In *McDonald*, supra, the Supreme Court ruled on an issue similar to Mottaz, namely whether a revised statute concerning limitations on actions was intended as an expansion of its previous meaning and construction. The Court held that such a revision cannot change its meaning unless there is clear evidence that Congress intended to change it:

> "So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Const. St. 365. As said by the New York Court for the correction of errors, in *Taylor v. Delancy*, 2 Caines. Cas. 150: "Where the law antecedently to the revision was settled, either by clear ex-

> pressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of law unless such phraseology evidently purports an intention in the legislature to work a change' ". (*McDonald*, supra, at page 146).

In short, former section 41(20) of Title 28 pertained only to actions enumerated within that statute, while actions involving Indians and their allotment lands were authorized under an entirely different statute, 25 U.S.C. 345. Secondly, the terms of neither statute, 41(20) nor 25 U.S.C. 345, nor the Revisor's Notes to 28 U.S.C. 2401, nor the legislative history indicate an intention to place a new limitation on actions under 25 U.S.C. 345. No limitation existed prior to the 1948 recodification, and there is no *clearly expressed intention* in the 1948 Revised Code to place this statute of limitations on claims under 25 U.S.C. 345. Therefore, 28 U.S.C. 2401(a) does not apply to 345 actions.

B. THE GENERAL STATUTE OF LIMITATIONS 28 U.S.C. 2401 (a) DOES NOT APPLY TO SPECIFIC INDIAN LAND ALLOTMENT ACTIONS UNDER 25 U.S.C. 345, SINCE A GENERAL LAW IS NOT DESIGNED TO LIMIT SPECIFIC RIGHTS OR GRANTS.

The courts have historically given favorable construction to specific Indian statutes. In *Antoine v. United States*, 637 F.2d 1177 (1981), the Eighth Circuit Court of Appeals, in a 25 U.S.C. 345 claim for money damages, states:

> "We first emphasize that a statute designed to safeguard the rights of Indians is to be broadly interpreted so as to give the Indians the maximum protection possible under the language of the enactment." (*Antoine*, supra, at page 1179).

In *United States v. Kagama*, 118 U.S. 375 (1886), the court stated that "[t]hese Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness . . there arises the duty of protection, and with it the power." In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the court said, when referring to Indian tribes that "their relation to the United States resembles that of a ward to his guardian." *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 615 (1956), concerned the application of income tax consequences to trust property. The court noted at that time that statutes relating to Indians are: "to be resolved in favor of the weak and defenseless people who are wards of the nation dependent upon its protection and good faith".

Ordinary rules of statutory construction support the position that, a general law will not affect special acts unless it is clearly expressed. The Eighth Circuit Court of Appeals in *Hemmer v. United States*, 204 F.2d 898, 906 (1916), noted that:

> "Privileges granted to a certain class by special act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule."

When dealing with special rights granted to Indians, the courts have held that "General Acts of Congress did not

apply to Indians, unless so expressed as to clearly manifest an intention to include them." *Elk v. Wilkins,* 112 U.S. 94, 5 S.Ct. 41, 44 (1884). This principle has not been rejected by the Supreme Court in *F.P.C. v. Tuscarora Indian Nation,* 362 U.S. 99 (1960). The land in dispute in the *Tuscarora* case was held by the Indians in *fee* not by the government in *trust*. This important distinction was noted in a Ninth Circuit decision. *United States v. Truckee-Carson Irrigation District, State of Nevada,* 649 F.2d 1286, 1298 (1981). For a reaffirmance and a detailed analysis of the court's application of these rules of construction, see Cohen, *Handbook of Federal Indian Law,* (1982 ed.) pages 282-286.

25 U.S.C. 345 was enacted in 1894, c. 290, section 1, 28 Stat. 305, and amended in 1901, c. 217, section 1, 31 Stat. 760, and 1911, c. 231, section 291, 36 Stat. 1167, and to this day contains no expressed time limitations. There is nothing in the legislative history of 25 U.S.C. 345 that indicated any intention by Congress to imply a statute of limitations within the act. This act is a special right granted by Congress and a general statute of limitations should not apply to it.

C. CONGRESS HAS EXPRESSED AN INTENT IN 28 U.S.C. 2415 AND THE INDIAN CLAIMS ACT OF 1982 THAT THESE ACTIONS NOT BE BARRED.

The background behind 28 U.S.C. 2415 is set forth in *Covelo Indian Community v. Watt,* 551 F.Supp. 366 (D.C.C. 1982). In summary, prior to 1966, there was no general statute of limitations applicable to the United States as plaintiff in cases seeking money damages against third parties. In 1966, Congress sought to correct this perceived

inequity by passing the statute of limitations contained in 25 U.S.C. 2415. §2415(c) specifically provides that no time limits were placed on actions "to establish the title to, or rights of possession of, real or personal property." Under §2415, actions accruing prior to July 18, 1966 were deemed to have accrued on that date.

In late 1971, as the initial six year period drew to a close, Indians and government officials became concerned that pre-1966 claims might be extinguished with the running of the statute of limitations on July 18, 1972, unless the federal government took action to identify, evaluate, and where appropriate, file lawsuits to assert those Indian claims. The Department of Interior ardently supported an extension of the statute of limitations for pre-1966 Indian claims so that claims could be identified and filed. 118 Cong. Rec. 28117 (August 14, 1972), reprinted in (1972) U.S. Code Cong. & Ad News 3592, 3595. Consequently, in 1972, Congress extended the time in which the United States could assert pre-1966 claims on behalf of Indians to July 18, 1977. P.L. 92-485, 86 Stat. 803 (Oct. 13, 1972).

Once again in 1977, at the urging of the Department of Interior and the Department of Justice, Congress extended the federal statute of limitations insofar as it applied to actions for money damages brought by the United States on behalf of Indians with pre-1966 claims. P.L. 95-103, 91 Stat. 842 (August 15, 1977).

On March 27, 1980 the time was extended until December 31, 1982. Then, largely in response to *Covelo,* supra, in which the inadequacies of the federal government's claims identification program were exposed, and, in conjunction with a strong lobbying effort, the Indian Claims Act of 1982, 96 Stat. 1976 was passed extending the time

period again for a period of one year if Congress publishes a notice rejecting such claims or three years if a legislative solution is proposed.

Approximately 4,683 title claims (secretarial transfers such as the one here and forced fees) were identified under the Statute of Limitations Project. Many more were called to the attention of the government and placed on a second list published on November 7, 1983. Federal Register Vol. 48, No. 216, pp. 51, 204-51, 268. As stated previously, a common factor among these title claims is federal complicity. If 25 U.S.C. 345 is ultimately determined to be the exclusive remedy for actions on allotments and/or if the United States is viewed as indispensable to such actions even where suit is brought against third parties to recover the land (points not conceded but nevertheless issues which have been raised as defenses in South Dakota) and if 28 U.S.C. 2401 is held to apply to all causes of action against the United States, then 28 U.S.C. 2415 would be useless as to a substantial portion of the most important claims. This would directly frustrate the federal policy expressed in that act of allowing the claims covered by the act to be brought so long as the time limits therein are observed.

CONCLUSION

The undisputed evidence in this case indicates a systematic deprivation of the property rights of the individual members of this class consisting of heirs and assignees of the original Indian allottees. The United States had a fiduciary duty to protect this land and not to transfer it without the consent of the Indians or without a court hearing and due process of law. If relief is not granted to this class of victims in this type of class action, there is no other adequate remedy available to right these wrongs and a massive injustice will occur. In short, there will be a wrong without a remedy for thousands of innocent people who placed their trust in the United States. We feel that the Eighth Circuit Court of Appeals recognized this problem and used the principle enunciated in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), that a void transfer of restricted allotments does not transfer title and that the allottee or heirs should not be barred by statutes of limitation, to prevent the massive injustice that would result from a contrary holding. Furthermore, this is a 25 U.S.C. 345 case and there is, therefore, no statute of limitations that applies. The Eighth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

Additional Statutory Provisions Involved:

1. 28 U.S.C. 41(20), Predecessor Statute to Section 2401 (a), prior to recodification

Suits against United States.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. Nothing in this paragraph shall be construed as giving to

either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the Civil War, and commonly known as "war claims", or to hear and determine other claims which had been rejected or reported on adversely prior to the 3d day of March 1887 by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions, or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof: but no suit pending on the 27th day of June 1898 shall abate or be affected by this provision. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (Mar. 3, 1911, ch. 231, §24, par. 20, 36 Stat. 1093; Nov. 23, 1921, ch. 136, §1310(c), 42 Stat. 311; June 2, 1924, 4:01 p.m., ch. 234, §1025 (c), 43 Stat. 348; Feb. 24, 1925, ch. 309, 43 Stat. 972. Feb. 26, 1926, ch. 27, §§1122(c), 1200, 44 Stat. 121, 125.)